81022-2



No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 35733-0-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

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DOT FOODS, INC.,

Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.



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# PETITION FOR REVIEW

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EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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## A. Identity of Petitioner.

The petitioner is Dot Foods, Inc., appellant in the Court of Appeals and petitioner in a tax refunds action brought in Thurston County Superior Court. Dot Foods is an Illinois corporation with headquarters in Mt. Sterling, Illinois.

## B. Court of Appeals Decision.

The Court of Appeals' published decision was issued on November 27, 2007. ***Dot Foods, Inc. v. Department of Revenue***, __ Wn. App. __, __ P.3d ___, 2007 WL 4170623 (2007). A copy of the slip opinion is attached as Appendix A.

## C. Issues Presented For Review

In 1983, the Legislature granted an exemption from B&O tax to an out-of-state seller who makes sales in Washington State "exclusively to or through a direct seller's representative," defined as a person who "sells or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment." RCW 82.04.423. (Appendix B)

1. Did the Court of Appeals impermissibly add language that the Legislature did not include in RCW 82.04.423, and disregard the statute's legislative history, in denying the exemption to an out-of-state seller that sold all of its goods "*exclusively through a direct*

*seller's representative*" at a non-retail location, because a de minimus share of those goods were non-consumer products, and because some of them were sold by others in permanent retail establishments?

2. Did the Court of Appeals err in giving deference to the Department's 2000 reversal of its 17-year-old administrative interpretation of RCW 82.04.423, where the prior interpretation was consistent with the Legislature's intent to grant tax relief to out-of-state sellers marketing through Washington-based wholesalers, and where the Legislature had not changed the statutory language?

## D. Statement Of The Case.

### 1. The Department Granted Dot Foods The Exemption From B&O Tax Under RCW 84.04.423 As An Out-of-State Seller That Sells Consumer Products In Washington State Exclusively Through A Direct Seller's Representative.

Dot Foods, Inc. an Illinois corporation, sells food products to dairies, meat packers, food processors, and other food service companies in Washington State. These customers either use Dot Foods' products as ingredients in products that are, in turn, sold to permanent retail establishments such as grocery stores, or they are wholesalers who resell Dot Foods' products to restaurants or to other food service operators or institutions, such as nursing homes,

schools, hospitals and cafeterias. (CP 62) Of the 60,000 products carried by Dot Foods, over 99% are "consumer products," comprising over 99.5% of Dot Foods gross revenue, such as dry foods, sauces, and refrigerated foods. (CP 119-66, 306-07)

Since 1997, Dot Foods has contracted with its wholly owned subsidiary, Dot Transportation, Inc ("DTI") to solicit sales of Dot Foods' products in Washington State. (CP 71) DTI employs Washington sales representatives who solicit sales of Dot Foods' products by making sales calls in person to food service distributors, meat packers, and dairies in Washington. (CP 62, 308-09) All products sold by Dot Foods to Washington customers through DTI are shipped to Washington from outside Washington State. (CP 62) Dot Foods does not sell its products to DTI for resale in Washington State and conducts no other activity in Washington. (CP 62)

Dot Foods does not sell any of its products to permanent retail establishments. (CP 62) DTI salespersons have never made sales calls on supermarkets or other permanent retail establishments. (CP 62) DTI received a commission based on the sale of Dot Foods products to Washington customers and paid B&O tax to the Department of Revenue on all commissions. (CP 63, 231-67)

In 1983 the Washington Legislature enacted a "direct seller's" exemption from the Business and Occupation (B&O) tax, exempting an out-of-state seller's sales, through a "direct seller's representative," RCW 82.04.423(1)(d), of consumer products sold "in the home or otherwise than in a permanent retail establishment." RCW 82.04.423(2) The Legislature established two alternative definitions of "direct seller's representative" – one based on those who "buy consumer products . . . for resale," and another for those who "sell, or solicit the sale of, consumer products" on behalf of an out-of-state seller:

> (2) For purposes of this section, the term "direct seller's representative" means a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, **or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment;**

RCW 82.04.423(2) (emphasis added).

Following enactment of the direct seller's exemption, the Department of Revenue interpreted the second clause of RCW 82.04.423(2) in accordance with its plain language as authorizing the exemption when the taxpayer-seller made no sales in a "permanent retail establishment," even if subsequent sellers might ultimately sell the taxpayer's products at retail further down the stream of

commerce. Former WAC 458-20-246 (defining direct seller's representative as one who solicits the sale of consumer products other than in a permanent retail establishment) (WSR 84-24-028 (Nov. 30, 1984)); 3 WTD 357 (1987) (*reprinted at* CP 272-76).

The Department of Revenue issued a private letter ruling to Dot Foods in 1997, advising Dot Foods that it remained "exempt from B&O tax under RCW 82.04.423 as long as the subsidiary [DTI] will not make sales from a permanent retail establishment." (CP 69) DTI continues to solicit the sale of consumer products on behalf of Dot Foods to Washington customers. There is no dispute that Dot Foods met, and continues to meet, that and all other conditions set forth in the private letter ruling. (CP 62-63, 68)[1]

**2. The Department Reversed Its Interpretation Of RCW 84.04.423 And Assessed Over $700,000 Of B&O Taxes On Sales Made Through Its Direct Seller's Representative.**

In 1999, the Department of Revenue reversed its previous interpretation of RCW 82.04.423, issuing an "interpretive rule," revising WAC 458-20-246. The Department interpreted the second

[1] The Court of Appeals adopted the parties' agreed facts that Dot Foods satisfies the first three criteria of RCW 82.04.423(1): Dot Foods does not own or lease real property within this state, RCW 82.04.423(1)(a); Dot Foods does not "regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business," RCW 82.04.423(1)(b), and Dot Foods "[i]s not a corporation incorporated under the laws of this state." RCW 82.04.423(1)(c). (Slip Op. at 2)

clause of RCW 82.04.423(2) as applying only if "the product is sold at retail in the home or in a nonpermanent retail establishment . . . [r]egardless of to whom the representative sells . . ." WAC 458-20-246(4)(b)(i)(B). *See* WSR 99-24-007 (Nov. 19, 1999).

In 2004, the Department audited Dot Foods' B&O tax returns and disallowed Dot Foods' direct seller's exemptions from the effective date of its new rule, concluding that Dot Foods owed $707,848 in back B&O taxes for the years 2000-2003, plus statutory interest and penalties based on the Department's 2000 revisions to WAC 458-20-246. (CP 76, 98-101) The Department claimed that Dot Foods was "no longer" eligible for the direct seller exemption "as your products are ultimately sold in permanent retail establishments." (CP 79) The Department did not deny the exemption because a de minimus share of the products Dot sold through its DSR into Washington were non-consumer goods. (CP 78-80)

### 3. Division Two Held That the Department's Interpretation Of An Ambiguous Tax Exemption Statute Was Entitled To Deference.

In 2005, Dot Foods filed this action for refund of B&O taxes in Thurston County Superior Court, claiming that it remained entitled to the direct seller's exemption under the second clause of RCW 82.04.423(2), and seeking a total refund of $1,112,039.42 from 2000

through 2004. (CP 5-10, 22-31) The superior court dismissed Dot Foods' refund action and granted summary judgment in favor of the Department. (CP 327-30; RP 8, 11) Division Two affirmed the trial court in a published decision. ***Dot Foods, Inc. v. Department of Revenue***, __ Wn. App. __, __ P.3d __, 2007 WL 4170623 (2007) (App. A)

The Court of Appeals held that the statutory exemption applies only to those direct sellers that "exclusively sell consumer products in Washington." (Slip Op. at 7) The Court of Appeals also adopted the Department's interpretation of the second clause of RCW 82.04.423(2), disallowing the exemption because Dot Foods' product are ultimately sold at retail. (Slip Op. at 11-13)

## E. Argument Why Review Should Be Accepted.

### 1. The Court of Appeals Improperly Rewrote The Statutory Language By Adding An Exclusivity Requirement To Limit The Type Of Products A Direct Seller's Representative May Sell.

The Court of Appeals erred in reading the word "exclusively" into RCW 82.04.423(2)'s requirement that a direct seller's representative . . . "solicit the sale of consumer products." The Court of Appeals' holding that RCW 82.04.423's exemption is limited to sellers who "exclusively sell consumer products" improperly

rewrites the statutory language, in derogation of established caselaw.

The only "exclusivity" requirement is found in RCW 82.04.423(1)(d), which states that the B&O tax does not apply "to any person . . . if such person: . . . (d) Makes sales in this state exclusively to or though a direct seller's representative." The definition of a direct seller's representative, contained in RCW 82.04.423(2), is "one who buys consumer products . . . or solicits sales of consumer products." Subsection (2) contains no exclusivity requirement and does not require that the direct seller's representative sell only consumer products.

"Statutory construction cannot be used to read additional words into the statute." ***Densley v. Department of Retirement Systems***, __ Wn.2d __, ¶ 15, __ P.3d __, 2007 WL 3378550, *3 (2007). Although a taxpayer has the burden of establishing the eligibility for an exemption, ***Group Health Co-op. of Puget Sound, Inc. v. Wash. State Tax Comm'n***, 72 Wn.2d 422, 429, 433 P.2d 201 (1967), this Court interprets a statute, including a tax exemption, in accordance with its plain and unambiguous language, and will not adopt an interpretation of statutory language that "conflicts with the statute's plain meaning." ***Sacred Heart Medical Center v.***

***Department of Revenue***, 88 Wn. App. 632, 637-38, 946 P.2d 409 (1997). In reading the word "exclusively" into RCW 82.04.423(2), the Court of Appeals disregarded these settled principles of statutory interpretation. This Court should accept review and reverse. RAP 13.4(b)(1), (2).

The Court of Appeals' misreading of the statute was even more egregious because it disregards almost 25 years of consistent administrative interpretation by the Department, while simultaneously, deferring to the Department's newly revised interpretation of the scope of the direct seller's exemption under RCW 82.04.423(1)(d). (*See* Subsection 2, *infra*) Since the Legislature enacted this statute in 1983, the Department has consistently recognized that the exclusivity provision relates to the "means" by which sales are made – exclusively through a direct seller's representative – rather than to the type of sales, as the Court of Appeals held here. WAC 458-20-246(4)(b)(ii) currently provides simply that a "direct seller must be selling a consumer product" and does not require that the direct seller exclusively sell consumer products, as the Court of Appeals held below.

It is undisputed that over 99% of the 60,000 products carried by Dot Foods are consumer products. (CP 306-07) This Court has

held that a taxpayer's sale of other products that do not qualify for an exemption does not disqualify the taxpayer from claiming the exemption with respect to the products that do qualify for the exemption. ***Lone Star Industries, Inc. v. Department of Revenue***, 97 Wn.2d 630, 647 P.2d 1013 (1982). *See also*, ***Agrilink Foods, Inc. v. Department of Revenue***, 153 Wn.2d 392, 397-98, 103 P.3d 1226 (2005) (taxpayer was entitled to a lower tax rate for products that fell within the lower statutory rate despite the fact that it manufactured other products that fell within the definition of a higher statutory rate.).

This Court has yet to address the scope of the direct seller's exemption from B&O tax under RCW 84.04.423. However, the Court of Appeals decision conflicts with established precedent requiring that statutory language be interpreted according to its plain meaning and disallowing the import of words into the statute that the Legislature did not use. *See* RAP 13.4(b)(1), (2). This Court should accept review and hold that Dot Foods' sale of a miniscule amount of non-consumer products does not exclude Dot Foods from a tax exemption for its sale of consumer goods "exclusively through a direct seller's representative."

### 2. The Court of Appeals Erred In Deferring To The Department's Revised Regulation That, For The First Time, Precluded A Direct Seller From Claiming The Exemption If Any Subsequent Sale Takes Place In A Permanent Retail Establishment.

The Court of Appeals also improperly rewrote RCW 82.04.423 when it held that Dot Foods failed to qualify for the direct seller's exemption under RCW because Dot Foods' consumer products are eventually sold by others at retail. The Court of Appeals' interpretation of RCW 82.04.423 conflicts with the plain statutory language, and improperly defers to the Department's recently revised regulation, rather than its previous interpretation that for 17 years honored the Legislature's intent. Review is appropriate under RAP 13.4(b)(1) and (4).

By its terms, RCW 82.04.423(2) allows the exemption if a direct seller's representative sells the taxpayer's consumer products in a non-retail establishment, and does not bar the exemption if someone else later sells those same products in retail establishments:

> For purposes of this section, the term "direct seller's representative" means a person who buys consumer products on a buy-sell basis or a deposit commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment ***or*** **who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment.**

RCW 82.04.423(2) (emphasis added). Dot Foods satisfies the second of the Legislature's two alternative and disjunctive definitions of a "direct seller's representative."

The Court of Appeals held that the two clauses of RCW 82.04.423(2) distinguish between wholesale sales (clause one) and retail sales (clause two) – a distinction that does not appear in RCW 82.04.423(2) at all:

> [T]he Department contends that a sale *through* a direct seller's representative [in clause two] refers to retail sales where the representative sells to the consumer outside of a permanent retail establishment. This corresponds to the second clause of RCW 82.04.423(2), which applies to a person who sells or solicits the sale of consumer products outside of a permanent retail establishment. The Department points out that the "or any other person" language is unnecessary in this clause because the clause refers to the final sale of a product to the consumer, not the sale of a product to another re-seller.

(Slip Op. at 8) The Court of Appeals' decision adopting the Department's interpretation contravenes the statutory language.

The Legislature provided that the B&O tax would not apply "to any person in respect to gross income derived from the business of making sales at wholesale or retail" if the seller complied with the statutory criteria for the exemption. RCW 82.04.423(1). That statutory language – the only reference to "wholesale" or retail sales in the statute – provides no support for the wholesale/retail

distinction adopted by the Court of Appeals in RCW 82.04.423(2). Where the "Legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent." ***United Parcel Serv., Inc. v. Department of Revenue***, 102 Wn.2d 355, 363, 687 P.2d 186 (1984). The plain and unambiguous language in RCW 82.04.423(1)(d) distinguishes between sales "to" and "through" a direct seller's representative but makes no distinction between wholesale and retail sales.[2]

The Court of Appeals deferred to the Department's 2000 revised rule, which provides that "[t]he direct seller may take the exemption only if the retail sale of the consumer product takes place either in the home or otherwise than in a permanent retail establishment . . . Regardless of to whom the representative sells, the retail sale of the product must take place either in the buyer's home or in a location that is not a permanent retail establishment." WAC 485-20-246(4)(b)(i)(B). (Slip Op. at 10)

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[2] The Court of Appeals agreed with the Department's contention that the Legislature' intended to adopt the wholesale/retail distinction used by Congress under 26 U.S.C. § 3508, which alleviates responsibility for payroll taxes on the part of direct sellers for representatives who are "statutory non-employees." The Court of Appeals erred in holding that the Legislature used "language identical to the federal statute," (Slip Op. at 16). In fact, the Legislature employed different language than that used by Congress, indicating its intention to adopt a definition of "direct seller" different from that under federal law. *See* ***Everett Concrete Prod., Inc. v. Department of Labor & Indust.,*** 109 Wn.2d 819, 826, 748 P.2d 1112 (1988). (*See* Mem. Of Amicus Curiae URM Stores, Inc.)

"An administrative agency, however, cannot modify or amend a statute by regulation." ***Bird-Johnson Corp. v. Dana Corp.***, 119 Wn.2d 423, 428, 833 P.2d 375 (1992). This Court "will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency." ***Agrilink***, 153 Wn.2d at 396-97 (interpreting RCW 82.04.260 according to its plain language and rejecting Department's "strained" interpretation). *See also* ***Edelman v. State ex. rel. Public Disclosure Comm'n***, 152 Wn.2d 584, 590, 99 P.3d 386 (2004) (court will not defer to an agency's rule where no ambiguity exists in the statute); ***Budget Rent A Car Corp. v. State, Department of Licensing***, 144 Wn.2d 889, 901, 31 P.3d 1174, (2001) (Department's interpretation not entitled to deference where "it conflicts with the relevant statute"). The Court of Appeals decision ignores these settled principles.

DTI is a direct seller's representative under the second clause of RCW 82.04.423(2) because, on behalf of Dot Foods, DTI "solicits the sale of, consumer products . . . otherwise than in a permanent

retail establishment." RCW 82.04.423(2).[3] Because all of Dot Foods' sales of consumer products in the State of Washington are made exclusively through a direct seller's representative, Dot Foods' sales fall within the plain language of the exemption from B&O tax under the second clause RCW 82.04.423(2). Unlike clause one, clause two does not bar the exemption if "any other person" may purchase the product in a retail establishment.

The Court of Appeals reasoned that the Department's wholesale/retail definition gave effect "to all phrases in the statute," because "permitting Dot Foods, and other sellers like them, to take the direct seller's exemption even though their products are ultimately sold in permanent retail establishments, renders the statute's 'otherwise than in a permanent retail establishment' requirement meaningless." (Slip Op. at 11) To the contrary, however, the statutory language makes clear that permanently established retailers cannot qualify as commissioned direct seller representatives, while the exemption would still, through clause two,

[3] The Court of Appeals cited its earlier decision in ***Stroh Brewery Co. v. Dep't. of Revenue***, 104 Wn. App. 235, 15 P.3d 692, *rev.* denied, 144 Wn.2d 1002 (2001), to support the distinction between wholesale and retail direct sellers. However, the Court of Appeals failed to note that the taxpayer in ***Stroh Brewery*** agreed that its claim was limited to the first clause of the statute, which it characterized as a "wholesale" direct seller's exemption." 104 Wn. App. at 240.

apply to (a) businesses that use commissioned representatives to sell at retail outside permanent establishments, and (b) businesses that use commissioned representatives to sell at wholesale.

Moreover, the Court of Appeals ignored the fact that the Legislature used the term "or any other person" to prohibit the exemption where the product is ultimately sold at retail in clause one, but not in clause two. By disallowing the exemption because Dot Foods' products may be sold "by any other person" in retail establishments, the Court of Appeals again added words to the statute, which the Legislature did not employ. *See* ***Densley***, ¶ 15, 2007 WL 3378550 at *3 (2007). The Court of Appeals recognized that Dot Foods' interpretation of the plain language of RCW 84.04.423, "does seem more literal than the Department's" revised interpretation under the 2000 version of WAC 485-20-246. (Slip Op. at 11) Its refusal to give effect to the statutory language was error.

The Court of Appeals also misread this Court's precedent in holding that it should defer to the Department's newly revised regulation interpreting the direct seller's exemption. The Court of Appeals narrowly read this Court's decision in ***Association of Washington Business v. Department of Revenue***, 155 Wn.2d 430, 446-67, 120 P.3d 46 (2005), to hold that "regardless of whether

the rule is interpretive or legislative . . . we may still afford some deference to the Department's reasonable interpretation of the ambiguous statutory language in RCW 82.04.423.[4] In ***Ass'n of Wash. Bus.***, this Court held that "[I]nterpretative rules . . . are not binding on the courts at all: Reviewing courts are not required to give any deference whatsoever to the agencies' views on . . . [the] correctness and desirability of the agencies' interpretations." 155 Wn.2d at 446-47.

This limited view of the Court's holding in ***Assoc. of Wash. Bus.***, was particular erroneous here, where the Department revised its longstanding interpretation of statutory language, without a legislative change, and without articulating any changed circumstances or other facts justifying such a 180 degree change of heart. *See* ***Dimension Financial Corp. v. Board of Governors of Federal Reserve System***, 744 F.2d 1402, 1409-10 (10th Cir. 1984), *aff'd*, 474 U.S. 361, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986) (agency must "articulate[] facts . . . show[ing] a purpose for the change" where it radically changes its position on statutory construction.). *Compare* ***Kiblen v. Pickle***, 33 Wn. App. 387, 393, 653 P.2d 1338

[4] The Court of Appeals similarly held that the revised rule was an "interpretive rule" and not a "significant legislative rule," which would have required additional notice and cost/benefit analysis in the rulemaking process, pursuant to RCW 34.05.328(5)(c)(iii). (Slip Op. at 14)

(1982) (agency entitled to deference in its interpretation of statute, "especially when a statute is in its initial stage of interpretation and its provisions are yet untried and new."). The Court of Appeals' deference to an agency's radical departure from its longstanding interpretation of statutory language conflicts with this Court's decision in ***Assoc. of Wash. Bus.***, and presents an issue of substantial public concern. RAP 13.4(b)(1), (4).

The Court of Appeals also ignored the legislative intent underlying the enactment of the direct seller's exemption in 1983. RCW 82.04.423 – to "treat out-of-state businesses more favorably than in-state businesses. " *See* Kunsch, 1B *Wash. Practice* § 72.32 (4th Ed. 1997). The Department itself has described the legislative purpose of RCW 82.04.423, "to stimulate trade and encourage out-of-state manufacturers to use Washington-based agents," and has identified the statute's primary beneficiaries as "out-of-state manufacturers that conduct business in Washington through independent sales representatives." Wash. Dept. of Revenue, *Tax Exemptions 2004* at 96. (CP 269)

The Legislature rationally determined that notwithstanding a constitutional nexus, such out-of-state businesses, which avail

themselves quite minimally of the benefits, protections, and services of this taxing jurisdiction, should be encouraged to use Washington based agents to market their consumer products.[5] The Department unsuccessfully urged the Governor to veto the exemption in 1983, characterizing the law as providing an exemption "for out-of-state manufacturers who make sales in Washington exclusively though the 'direct selling scheme.'" (CP 229)

The Court of Appeals decision improperly grants the Department authority to do by regulation what the Legislature and the Governor would not do when the exemption was drafted, debated, passed, and signed in to law. The Court of Appeals decision directly contradicts this legislative intent and jeopardizes the ability of out-of-state manufacturers to employ locally based direct seller's representatives to sell their products at wholesale in the State of Washington. This Court should accept review and reverse.

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[5] The Senate debate surrounding the enactment of RCW 82.04.423 in 1983 indicates that the Legislature was concerned about the viability of the wholesale apparel market located in the Seattle Trade Center, where representatives for out-of-state garment manufacturers sold clothing to wholesale buyers. Senate Journal, 48th Legis., 1st Ex. Sess. 2212 (1983) (colloquy reflects that the bill was intended to "take care of the particular problem faced by some of the occupants of the Seattle Trade Center.") (CP 230; *See* URM Amicus Mem. at 3-6)

## F. Conclusion.

Dot Foods is an out-of-state seller that sells consumer products exclusively through a direct seller's representative. The Court of Appeals' statutory interpretation conflicts with this Court's decisions and presents an issue of substantial public concern. This Court should accept review and hold that Dot Foods is entitled to a refund of B&O taxes under RCW 82.04.423.

Dated this 21st day of December, 2007.

EDWARDS, SIEH, SMITH & GOODFRIEND, P.S.

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Attorneys for Petitioner

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 21, 2007, I arranged for service of the foregoing *Petition for Review* to the court and the parties to this action as follows:

| | |
|---|---|
| Office of Clerk<br>Court of Appeals - Division II<br>950 Broadway, Suite 300<br>Tacoma, WA 98402 | ___ Facsimile<br>___ Messenger<br>_✓_ U.S. Mail<br>___ Overnight Mail |
| Jacquelyn A. Beatty<br>Karr Tuttle Campbell<br>1201 3rd Ave., Suite 2900<br>Seattle, WA 98101-3284 | ___ Facsimile<br>___ Messenger<br>_✓_ U.S. Mail<br>___ Overnight Mail |
| Cameron G. Comfort<br>Office of the Attorney General<br>Revenue Division<br>7141 Cleanwater Dr. SW<br>PO Box 40123<br>Olympia, WA 98504-0123 | ___ Facsimile<br>___ Messenger<br>_✓_ U.S. Mail<br>___ Overnight Mail |

**DATED** at Seattle, Washington this 21st day of May, 2007.

Daniel F. King

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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|---|---|
| DOT FOODS, INC.,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF REVENUE, STATE OF WASHINGTON,<br><br>Respondent. | No. 35733-0-II<br><br><br><br><br><br>PUBLISHED OPINION |

PENOYAR, J. — Dot Foods sought a refund of business and occupation (B&O) taxes paid between 2000 and 2006, claiming that the Department of Revenue (Department) improperly denied them an exemption. During this time period, Dot Foods produced food products out-of-state that it sold (through a wholly-owned subsidiary) to dairies, meat packers, and other food processors located in Washington, who then used the products as ingredients in other products that were sold to various retail outlets in Washington. Dot Foods appealed to the trial court for a refund of the taxes, claiming that it qualified for a statutory exemption for out-of-state persons selling consumer goods only to or through a "direct seller's representative." RCW 82.04.423. The trial court disagreed, and Dot Foods appeals. Despite Dot Foods' arguments to the contrary, the plain language of the exemption illustrates that it should only apply where direct seller's representatives exclusively sell consumer products. Because Dot Foods admits that a portion of

its sales in Washington consist of non-consumer products, the exemption does not apply to them. We affirm.

## FACTS

Washington law imposes a B&O tax "for the act or privilege of engaging in business activities" in the state. RCW 82.04.220. This tax is subject to several exemptions, including an exemption for sales by certain out-of-state persons to or through a direct seller's representative. RCW 82.04.423(1)(d). Specifically, RCW 82.04.423(1) states that the B&O tax does not apply to gross income derived from wholesale or retail sales in the state if the person:

> (a) Does not own or lease real property within this state; and
> (b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and
> (c) Is not a corporation incorporated under the laws of this state; and
> (d) Makes sales in this state exclusively to or through a direct seller's representative.

Additionally, RCW 82.04.423(2) defines "direct seller's representative" in relevant part as:

> [A] person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment.

Dot Foods is an Illinois corporation that sells food and other products to food processors and food service distributors in Washington. The Department concedes that Dot Foods meets the first three requirements for the exemption (contained in RCW 82.04.423(1)(a)-(c)). The only requirement at issue here is whether Dot Foods "[m]akes sales in this state exclusively to or through a direct seller's representative." Clerk's Papers (CP) at 65; RCW 82.04.423(1)(d).

The Department issued a private letter ruling to Dot Foods in October 1997, stating that

Dot Foods qualified for the direct seller's representative exemption under RCW 82.04.423. The letter ruling specified that it was binding on both Dot Foods and the Department but that it would only remain binding until: "the facts change; the law (either by statute or court decision) changes; the applicable rule(s) change; the Department of Revenue publicly announces a change in the policy upon which this ruling is based; or Dot Foods, Inc. is notified in writing that this ruling is not valid." CP at 69.

Since receiving the private letter ruling, Dot Foods' Washington sales have been exclusively through its wholly-owned subsidiary, Dot Transportation, Inc. (DTI). While neither Dot Foods nor DTI have sold any products in Washington from a permanent retail establishment, food processors purchase Dot Foods' products and use the products as ingredients in products that are then sold in permanent retail establishments in Washington. Additionally, DTI employed salesmen who solicited sales of Dot Foods' products in Washington. The salesmen personally called on businesses in Washington to solicit sales of Dot Foods' products, but they did not take orders for such products—all orders were transmitted either electronically to Dot Foods' headquarters in Illinois or telephonically to sales representatives located in Illinois.

The Department issued a "Special Notice for Direct Sellers" in February 2000, which informed taxpayers that the Department had updated its interpretation of the B&O tax. CP at 73. The notice directed taxpayers to WAC 458-20-246,[1] and it specifically stated that "[i]f a

[1] The Department states in WAC 458-20-246 that '[t]his rule explains the statutory elements that must be satisfied in order to be eligible [for the direct seller's exemption].' The rule states that there are ten statutory elements that must be satisfied in order for a seller to be eligible for the exemption: the four statutory elements in RCW 82.04.423(1) (the seller cannot own or lease real property in Washington, must not maintain a stock of tangible personal property in Washington, is not incorporated in Washington, and makes all sales in the state through a direct seller's representative) and the six statutory elements in RCW 82.04.423(2) defining a direct seller's representative:

consumer product is sold by *anyone* in a permanent retail establishment, the direct sellers' exemption is not available to the direct seller." CP at 73. The Department sent a copy of the

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> (i) How the sale is made. . . . The direct seller sells the product using the services of a representative in one of two ways, which are described by two clauses in the statute. The first clause ('a person who buys . . . for resale' from the direct seller) describes a wholesale sale by the direct seller. The second clause (a person who 'sells or solicits the sale' for the direct seller) describes a retail sale by the direct seller.
>
> > (A) A transaction is on a 'buy-sell basis' if the direct seller's representative . . . is entitled to retain part or all of the difference between the price at which [he or she] purchases the product and the price at which [he or she] sells the product. . . . A transaction is on a 'deposit-commission basis' if the direct seller's representative . . . is entitled to retain part or all of a purchase deposit paid in connection with the transaction. . . .
> >
> > (B) The location where the retail sale of the consumer product may take place. . . . The direct seller may take the exemption only if the retail sale of the consumer product takes place either in the home or otherwise than in a permanent retail establishment. The resale of the products sold by the direct seller at wholesale is restricted by the statute through the following language: 'For resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment.' This restrictive phrase requires the product be sold at retail either in the home or in a nonpermanent retail establishment. Regardless of to whom the representative sells, the retail sale of the product must take place either in the buyer's home or in a location that is not a permanent retail establishment. . . .
>
> (ii) What product the direct seller must be selling. The direct seller must be selling a consumer product . . .
>
> (iii) How the person is paid. The statute requires that 'substantially all of the remuneration paid to such person . . . is directly related to sales or other output, including the performance of services, rather than the number of hours worked. . . .'
>
> (iv) How the contract is memorialized. The services by the person must be performed pursuant to a written contract between the representative and the direct seller. . . .
>
> (v) What the contract must contain. The sale and solicitation services must be the subject of the contract. The contract must provide that the representative will not be treated as an employee of the direct seller for federal tax purposes.
>
> (vi) The status of the representative. A person satisfying the requirements of the statute should also be a statutory nonemployee under federal law, since the requirements of RCW 82.04.423 and 26 U.S.C. 3508 are the same. . . .

WAC 458-20-246(4)(b).

notice to Dot Foods, which Dot Foods received.

The Department audited Dot Foods' B&O tax returns for 2000 through 2003 and, as a result, it issued a tax assessment due by October 2004. Dot Foods petitioned for administrative review of the tax assessment, but it also began to pay the tax, resulting in payments to the Department as follows: $50,973.27 for the 4th quarter of 2004; $302,973.48 for January through April 2006; and $747,123.26 in payment of the tax assessment. The parties then agreed to dismiss Dot Foods' petition for administrative review and proceed with the refund action in Thurston County Superior Court.

Both parties filed for summary judgment, which the trial court granted to the Department. The trial court relied heavily on this court's decision in *Stroh Brewery Co. v. Dep't of Revenue*, 104 Wn. App. 235, 15 P.3d 692, *review denied*, 144 Wn.2d 1002 (2001), narrowly construing the exemption in favor of the tax and against the taxpayer. The court concluded that Dot Foods did not qualify for the exemption, and it dismissed its claim with prejudice. Dot Foods now appeals.

## ANALYSIS

### I. Consumer Products

Dot Foods argues that the trial court erred in ruling that it did not qualify for the direct seller's exemption because it did not *exclusively* sell consumer products through a direct seller's representative. It contends that, contrary to the trial court's ruling, neither RCW 82.04.423(2) (defining "direct seller's representative") nor the Department's revision of WAC 458-20-246(4)(b)(ii) contain an exclusivity requirement regarding the types of products the representative is buying or selling. Therefore, "[t]he fact that Dot Foods may occasionally sell a non-consumer product does not disqualify it from the direct seller's exemption for consumer products." Appellant's Br. at 28. The Department

correctly responds that Dot Foods' interpretation does not read the statute as a whole and does not give effect to all the statutory language.

We review rulings on summary judgment and issues of statutory interpretation de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). When interpreting a statute, a reviewing court's fundamental duty is to give effect to the legislature's intent, which is primarily derived from the statutory language. *McLane Co., Inc., v. Dep't of Revenue*, 105 Wn. App. 409, 413, 19 P.3d 1119 (2001) (citing *U.S. Tobacco Sales & Mktg., v. Dep't of Revenue*, 96 Wn. App. 932, 938, 982 P.2d 652 (1999)). Where the statutory language is plain and unambiguous, we derive the meaning of the statute solely from that language. *McLane Co.*, 105 Wn. App. at 413.

A tax exemption presupposes a taxable status, and the burden is on the taxpayer to establish eligibility for the benefit. *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995) (citing *Group Health Coop. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967)). In interpreting the scope of a tax exemption, we resolve ambiguities in favor of taxation and against exemption. *Sehome Park*, 127 Wn.2d at 778. Specifically, we construe ambiguous tax exemptions strictly, though fairly, and in keeping with the statutory language. *Stroh*, 104 Wn. App. at 240 (citing *Safeway, Inc. v. Dep't of Revenue*, 96 Wn. App. 156, 160, 978 P.2d 559 (1999)).

RCW 82.04.423(1)(d) states that the exemption applies only to sellers who make sales "exclusively to or through a direct seller's representative." Subsequently, RCW 82.04.423(2) specifically limits the definition of "direct seller's representative" to one who buys or sells consumer products. Therefore, construing the statute as a whole properly imputes the exclusivity requirement to the consumer products requirement. Dot Foods has not met its burden of proving

that the exemption should be read otherwise.

Additionally, Dot Foods' reliance on *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 397-98, 103 P.3d 1226 (2005), is misplaced. In that case, the court refused to impute a "perishable finished product requirement" to subsection (4) of RCW 82.04.260 where several other subsections included the "finished product" language, but subsection (4) did not. Conversely here, subsection (2) merely defines a term in subsection (1)—it is not delineating an entirely different category.

Under our interpretation of RCW 83.04.423, a direct seller must exclusively sell consumer products in Washington in order to qualify for the exemption. Therefore, Dot Foods does not qualify for the exemption, and we affirm.

II. Statutory Interpretation

The Department and Dot Foods also offer two different interpretations of the remaining language of the direct seller's exemption. The Department argues that RCW 82.04.423, when construed as a whole, limits the direct seller's exemption to those whose products are *never* sold in a permanent retail establishment. The Department stresses the parallel structure of a wholesale/retail distinction in RCW 82.04.423(1), which exempts "gross income derived from the business of making sales at *wholesale or retail* if such person . . . (d) [m]akes sales in this state exclusively *to or through* a direct seller's representative." (Emphasis added). According to the Department, a sale *to* a direct seller's representative refers to a wholesale sale, where the representative may resell the products *to another seller* outside of a permanent retail establishment. This corresponds to the first clause of RCW 82.04.423(2), which applies to a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, outside of a

permanent retail establishment.

Conversely, the Department contends that a sale *through* a direct seller's representative refers to retail sales where the representative sells *to the consumer* outside of a permanent retail establishment. This corresponds to the second clause of RCW 82.04.423(2), which applies to a person who sells or solicits the sale of consumer products outside of a permanent retail establishment. The Department points out that the "or any other person" language is unnecessary in this clause because the clause refers to the final sale of a product to the consumer, not the sale of a product to another re-seller. Resp't Br. at 19.

Dot Foods, on the other hand, argues that the two clauses of RCW 82.04.423(2) create "two alternative and disjunctive definitions" of the direct seller's representative: (1) a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, outside of a permanent retail establishment; and (2) a person who sells, or solicits the sale of, consumer products outside of a permanent retail establishment. Appellant's Br. at 17. Under this interpretation, Dot Foods claims that it satisfies the requirements of the second clause—DTI does not buy Dot Foods' products on a buy-sell or deposit-commission basis, but it does sell or solicit the sale of those products outside of permanent retail establishments.

Both of the offered interpretations of RCW 82.04.423 rely on the statute's plain language, and both are reasonable. Clearly, the statute is written ambiguously. As stated above, we resolve ambiguities in favor of taxation and against exemption. Additionally, the ambiguous language of the statute demands that we give some deference to the Department's interpretation. However, we note that further litigation regarding this statute will undoubtedly ensue if it is not amended to clarify the legislature's intent. Also, as a matter

of public policy, the legislature may wish to clarify its intent in this area of taxation instead of leaving the result to interpretation by the Department and the courts.

A. Deference to the Agency's Interpretation

Whether an agency's construction of the statute is accorded deference depends on whether the statute is ambiguous. *Waste Mgmt. of Seattle, Inc., v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Where an agency is charged with the administration and enforcement of a statute, the agency's interpretation of an ambiguous statute is accorded great weight in determining legislative intent. *Waste Mgmt.*, 123 Wn.2d at 628; *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14, 828 P.2d 549 (1992). A statute is ambiguous if it has more than one reasonable interpretation. *McLane Co.* 105 Wn. App. at 413.

Both the Department's and Dot Foods' interpretations of the statute appear reasonable, based on the plain language of the statute. Under the *Waste Management* rule, therefore, the agency's interpretation of the statute should be given "great weight." *Waste Mgmt.*, 123 Wn.2d at 628. However, in *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 446-47, 120 P.3d 46 (2005), the Washington Supreme Court delineated different levels of deference for agency's legislative rules and interpretive rules:

> Therein lies the true difference between interpretive and legislative rules: their effect on the courts. Legislative rules bind the court if they are within the agency's delegated authority, are reasonable, and were adopted using the proper procedure. *See Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 314-15, 545 P.2d 5 (1976). Interpretive rules, however, are not binding on the courts at all: 'Reviewing courts are not required to give any deference whatsoever to the agencies' views on that subject [correctness and desirability of the agencies' interpretations]. Legislative rules therefore have greater finality than interpretive rules because courts are bound to give some deference to agency judgments embodied in the former, but they need not defer to agency judgments embodied in

the latter.'

*Ass'n of Wash. Bus.*, 155 Wn.2d at 446-47 (quoting Arthur Earl Bonfield, State Administrative Rule Making § 6.9.1, at 281-82 (1986)).

Accordingly, Dot Foods argues that "[t]o the extent that the Department's 2000 revision to WAC 458-20-246 was merely an 'interpretive rule,'" we should afford it no deference. Appellant's Br. at 22-23. It contends that the Department radically departed from its longstanding interpretation of the statute, and therefore it was required to articulate a substantive basis for the change.[2]

Dot Foods' argument overstates the court's holding in *Ass'n of Wash. Bus.* While the court stated that interpretive rules are not binding on the courts "at all," it also stated that courts are not *required* to give deference to the agency's interpretation. *Ass'n of Wash. Bus.*, 155 Wn.2d at 447. Furthermore, the court clarified this statement by noting that:

> When a statute is ambiguous (i.e., subject to more than one reasonable interpretation), the agency's adoption of one of the possible reasonable choices is entitled to some deference. Even so, the agency's interpretation is not binding on the courts.

*Ass'n of Wash. Bus.*, 155 Wn.2d at 447, n.17 (citing *Weyerhaeuser Co.*, 86 Wn.2d at 315). Therefore, regardless of whether the rule is interpretive or legislative (see below), we may still afford some deference to the Department's reasonable interpretation of the ambiguous statutory language in RCW 84.04.423.

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[2] Dot Foods also claims that the statute is not ambiguous as it contains no references to "wholesale" or "retail" direct seller's representatives. However, this is the incorrect ambiguity standard—a statute is ambiguous if it lends itself to at least two reasonable interpretations. *McLane Co.*, 105 Wn. App. at 413. As stated above, the Department's interpretation is reasonable. Therefore, we consider the statutory language ambiguous even though the Department's labels of the two categories of representatives (wholesale and retail) are not themselves contained within the statute.

B. Rules of Statutory Interpretation

The rules of statutory interpretation also support the Department's position regarding RCW 82.04.423. As the Washington Supreme Court summarized in *Whatcom County v. Bellingham*:

> If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. The purpose of an enactment should prevail over express but inept wording. The court must give effect to legislative intent determined within the context of the entire statute. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.

*Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (internal citations and quotations omitted).

While Dot Foods' interpretation does seem more literal than the Department's, it does not construe the statute as a whole. It does not address the "wholesale or retail" distinction in RCW 82.04.423(1), nor does it offer an explanation for the statute's differentiation between sales "to or through" a direct seller's representative. *See* Appellant's Br. at 24-25; RCW 82.04.423.

Conversely, the Department's interpretation does incorporate and give meaning to all phrases in the statute. Additionally, the Department points out that permitting Dot Foods, and other sellers like them, to take the direct seller's exemption even though their products are ultimately sold in permanent retail establishments, renders the statute's "otherwise than in a permanent retail establishment" requirement meaningless. *See* RCW 82.04.423(2). It simply does not stand to reason that the legislature would have prohibited the exemption for representatives who buy products for resale (by the buyer or any other person) in a permanent retail establishment but allowed the exemption for representatives who sell or solicit the sale of products to others who then sell them in a permanent retail

establishment (as Dot Foods apparently contends).

Furthermore, in *Stroh*, we agreed with the Department's interpretation of the statute (at least as it pertains to the first clause), holding that "in order for a direct seller who sells to wholesalers to qualify for the exemption, neither the . . . direct seller's representative, nor 'any other person' may resell the direct seller's products in a permanent retail establishment." *Stroh*, 104 Wn. App. at 241. While both parties in that case conceded that the Department's interpretation of the exemption was reasonable, Stroh argued that it was but one reasonable interpretation of the statute, and not a fair one. *Stroh*, 104 Wn. App. at 241-42. The opinion resolved this argument by stressing that "fairly and consistently interpreted, the exemption does not apply if either the direct seller's representative or anyone else sells the direct seller's products in a permanent retail establishment." *Stroh*, 104 Wn. App. at 242.

C. Legislative Intent

Finally, the sweeping language of RCW 82.04.220 indicates that the legislature's intent in enacting the tax was to impose the tax upon "virtually all business activities carried on within the state" and to "leave practically no business and commerce free of . . . tax." *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000) (quoting *Budget Rent-A-Car of Wash.-Or., Inc. v. Dep't of Revenue,* 81 Wn.2d 171, 175, 500 P.2d 764 (1972); *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971)).

We construe ambiguous tax exemptions strictly, though fairly, and in keeping with the statutory language. *Stroh*, 104 Wn. App. at 240 (quoting *Safeway, Inc.*, 96 Wn. App. at 160). The Department's interpretation of the exemption complies with this standard: it is reasonable; it construes the statute as a whole, giving meaning to every word; and it complies with the legislature's intent to apply the B&O tax as

broadly as possible. We affirm the trial court's ruling and endorse the Department's interpretation of the direct seller's exemption.

III. Interpretive or Legislative Rule — Raised for the First Time on Appeal

Dot Foods also argues that the Department's special notice failed to comply with Administrative Procedure Act (APA) notice requirements, as it contends that the revision of WAC 458-20-246 was not an interpretive rule but, instead, a "significant legislative rule." Appellant's Br. at 30; see RCW 34.05.328. The Department responds that this argument is barred because (1) Dot Foods did not raise this issue at the trial court; (2) the APA has a two-year statute of limitations for challenging a rule on procedural grounds (RCW 34.05.375); and (3) Dot Foods violated RCW 82.32.180 by neglecting to raise this argument in superior court. In the alternative, the Department asserts that Dot Foods' argument has no merit.

In its reply brief, Dot Foods contends that it did preserve its APA argument at the trial court by arguing in its motion for summary judgment that the Department's special notice "was insufficient to defeat 'Dot's continued reliance upon the exemption approved in its [private letter ruling].'" Appellant's Reply Br. at 18 (quoting CP at 57). For support, Dot Foods cites the following language from *Nickerson v. City of Anacortes*, 45 Wn. App. 432, 437, 725 P.2d 1027 (1986): "[I]t is not necessary to cite all supporting authority in the trial court in order to preserve a substantive issue for appeal. It is only necessary that the issue be raised."

Dot Foods' arguments at the trial court fail to meet even this broad standard. Dot Foods' notice argument below stressed only that the Special Notice was insufficient to prevent Dot Foods from relying on the private letter ruling—it raised a reliance argument, not an administrative law argument. Nothing in Dot Foods' briefings or motions apprised the trial court that it may contest the Department's rulemaking procedure in

enacting its revisions to WAC 458-20-246.

Generally, issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). Dot Foods did not raise the issue of the Department's compliance with APA notice requirements on appeal; therefore, we need not address the merits of Dot Foods' interpretive/significant legislative rule argument.[3]

IV. Natural Person

Finally, the Department argues that Dot Foods does not qualify for the direct seller's exemption because DTI (its purported direct seller's representative) is a corporation, not a natural person. Dot Foods disagrees, pointing out that RCW 82.04.030 includes "corporation" in its definition of "person" and that RCW 82.04.010 applies that definition to the entire chapter.

The Department's argument is based on its contention that the requirements of RCW

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[3] Even if we were to examine this issue, Dot Foods' arguments are not persuasive. RCW 34.05.328(5)(c)(iii) defines "significant legislative rule" as a rule "other than a procedural or interpretive rule" that, in part, "adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction." RCW 34.05.328(5)(c)(iii). However, *Ass'n of Wash. Bus.*, 155 Wn.2d at 447, clarified this distinction:

> Technically, interpretive rules are not binding on the public. They serve merely as advance notice of the agency's position should a dispute arise and the matter result in litigation. The public cannot be penalized or sanctioned for breaking them. . . . Accuracy and logic are the only clout interpretive rules wield. If the public violates an interpretive rule that accurately reflects the underlying statute, the public may be sanctioned and punished, not by authority of the rule, but *by authority of the statute.* This is the nature of interpretive rules.

Dot Foods contends that the Department's statement (in its audit of Dot Foods) that the revised rule "has the same effect as [the] Revenue Act" constituted an admission that the regulation was a significant legislative rule. Appellant's Br. at 31. However, according to *Ass'n of Wash. Bus.*, the Department's statement that the rule carried the same weight as the Revenue Act was not necessarily an admission that the rule was not interpretive—as stated above, the Department's interpretation accurately reflects RCW 82.04.423. Dot Foods was not being sanctioned or punished because it violated the rule, but because it violated the *statute.*

82.04.423(2)(a) and (b) (requiring that substantially all renumeration paid to the direct seller's representative be directly related to output, and that the representative's services must be performed pursuant to a contract that makes clear that the representative is not an employee) "strongly imply that a direct seller's representative must be a natural person." Resp't Br. at 29. Additionally, the Department points out that RCW 82.04.010 contains limiting language ("Unless the context clearly requires otherwise, the definitions set forth in [sections including RCW 82.04.030] apply throughout this chapter").

Dot Foods is correct—the statutory language is not ambiguous here. RCW 82.04.010 specifically applies the RCW 82.04.030 definition of "person" to RCW 82.04.423 "unless the context clearly requires otherwise." Here, the context does not do so. Renumeration paid to a corporation may be directly related to output just as simply as renumeration paid to a natural person, and the contract requirement (making clear that the representative is not an employee) does not meet the standard of "clearly requir[ing] otherwise." RCW 82.04.010. We decline to endorse the Department's "natural person" requirement to the direct seller's exemption.

V. URM Stores' Amicus Brief

In an amicus brief, URM Stores, Inc. raised several arguments pertaining to differences between the federal and state statutes, the exclusivity of the consumer products requirement, and the Department's natural person argument. Specifically, URM first argues that the Department's reliance on federal law is misplaced, as the legislative intent behind 26 U.S.C. § 3508 and RCW 82.04.423 is substantially different: Congress enacted its "direct seller" definition to reduce disputes regarding employment status and allocate liability for payroll taxes, and the Washington Legislature enacted the direct seller's exemption "to provide a break from [B&O] tax to out-of-

state sellers." Amicus Br. at 4.

The Department agrees that the legislative intent behind the federal and state law differed, but it contends that it is reasonable to assume that, when the legislature used language ("direct seller") identical to that in the federal statute to describe which out-of-state businesses qualified for the exemption, the legislature therefore intended to exempt from B&O taxes those sellers engaged in similar activities as federal "direct sellers." Reply to Amicus Br. at 4-5. This argument is persuasive—the legislature would not have used language identical to the federal statute had it not intended that the state's exemption apply to sellers who acted in a manner similar to the federal statute's direct seller. The different purpose of the federal tax statute did not preclude the legislature from borrowing its language, and it does not blind us to the obvious similarities between the two statutes.

Additionally, both URM and the Department introduce legislative history that, on the whole, indicates that the legislature intended the exemption as a narrow one. URM included a colloquy between two senators regarding the exemption where they expressed concern that it would include sellers at the Seattle Trade Center. The Department included in its brief a memorandum to one of those senators stating that the Trade Center was not a permanent retail establishment and, therefore, the exemption would still apply to its sellers. The Department also notes that an original draft of the exemption, limiting B&O taxes to only those who own or lease property in Washington or who maintain a stock of personal property in Washington, was not passed (possibly because of the massive loss of revenue that would ensue). The exemption was not passed until the language was changed to its current form.

URM's attacks on the Department's use of federal law in its interpretation are unpersuasive, and neither of the briefs

presented novel arguments regarding the "exclusivity" and "natural person" issues. We affirm the trial court.

Penoyar, J.

We concur:

Houghton, C.J.

Bridgewater, J.

**RCW 82.04.423**

(1) This chapter shall not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

(a) Does not own or lease real property within this state; and

(b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and

(c) Is not a corporation incorporated under the laws of this state; and

(d) Makes sales in this state exclusively to or through a direct seller's representative.

(2) For purposes of this section, the term "direct seller's representative" means a person who

> buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment; and

(a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

(3) Nothing in this section shall be construed to imply that a person exempt from tax under this section was engaged in a business activity taxable under this chapter prior to the enactment of this section.